

THE NEW YORK OIL SPILL LAW

Navigation Law Article 12



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Navigation Law Article 12 (the “Oil Spill Law”) is the primary mechanism to deal with liability and cleanup for oil spills on land and water in New York State. The Oil Spill Law, enacted in 1977, prohibits the unpermitted discharge of petroleum. It follows the same basic pattern as the later federal and state Superfund statutes, creating strict liability for “[a]ny person who has discharged petroleum” (a “discharger”), and providing for cleanup financed by a government fund.

The law generally prohibits the “discharge of petroleum,” but does not apply to discharges “in compliance with the conditions of a federal or state permit.” Navigation Law §173. Special provisions relate to “major facilities” (including refineries, pipelines, and other facilities with a capacity greater than 400,000 gallons, Navigation Law §172(11), and coordination with the federal Oil Pollution Act of 1990. The statute is “liberally construed to effect its purposes.” Navigation Law §195; *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001); *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep’t 1994). The Oil Spill Law applies to spills which occurred before the statute was enacted in 1977. Navigation Law §190-a; *State v. Cities Service Co.*, 180 A.D.2d 940, 580 N.Y.S.2d 512 (3d Dep’t 1992); *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000). While liability has generally been assumed to be joint and several, under the rationale of a recent CERCLA case, *Burlington Northern & Santa Fe Railway Co. v. United States*, ___ U.S. , 129 S.Ct. 1870 (2009), it may be that courts will only find several liability where a reasonable basis for allocation can be found.

Note that petroleum is excluded from the federal Superfund Law (the Comprehensive Environmental Response Compensation and Liability Act, or “CERCLA”). CERCLA §101(14), 42 U.S.C. §9601(14); *see also Exxon Corporation v. Hunt*, 475 U.S. 355, 106 S.Ct. 1103 (1986). However, the Oil Spill Law does not preclude the right to sue under common law theories. Navigation Law §193; *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dep’t 2000).

I. Liability

A. Strict Liability for Dischargers. Under Navigation Law §181(1), “[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained....” There is no “third party” defense, so liability may be imposed on a “blameless” party. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep’t 1983), *mot. den’d* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). The “failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders [a defendant] liable as a discharger.” *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001). While the statute specifically provides that the “owner or operator of a major facility or vessel which has discharged petroleum” is strictly liable, the statute establishes a cap on the liability of such major facilities (*e.g.* refineries) and vessels. Navigation Law §181(3).

B. Discharge. “Discharge” is defined to include all “intentional and unintentional... releasing, spilling, leaking,... of petroleum “into the waters of the state or onto lands from which it might flow or drain into said waters....” Navigation Law §172(8). Those “waters” include “all lakes, springs, streams and bodies of surface or ground water.” Navigation Law §172(18). Accordingly, even spills on the land that “might flow or drain” into “ground water” are covered. Unless an oil spill is totally enclosed indoors, it is generally considered to be a “discharge” encompassed by the statute, and “judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater... and thereby cause ecological damage.” *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep’t 1983), *mot. den’d* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983); *see also Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d 171 (2d Cir. 2003). However, in *State v. Arthur L. Moon, Inc.*, 228 A.D.2d 826, 643 N.Y.S.2d 760, 761 (3d Dep’t 1996), *mot. for leave to appeal den’d* 87 N.Y.2d 861, 653 N.Y.S.2d 282 (1996), a question of fact was raised as to whether an oil spill “did not actually reach the groundwater or threaten to do so.”

C. Petroleum. “Petroleum” is defined to include “oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene.” Navigation Law §172(15). Thus, “‘hydrocarbons which are commonly associated with petroleum waste,’ broadly construed,” are encompassed within the definition of “petroleum.” *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep’t 1994).

D. Retroactive Liability. The Oil Spill Law applies to spills which occurred before the statute was enacted in 1977. Navigation Law §190-a; *State v. Cities Service Co.*, 180 A.D.2d 940, 580 N.Y.S.2d 512 (3d Dep’t 1992); *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000).

E. Burden of Proof. Ordinarily, the burden of proof is on a plaintiff to show that the defendant is the discharger. In *Prato v. Vigliotta*, 253 A.D.2d 749, 677 N.Y.S.2d 380 (2d Dep’t 1998), the plaintiff’s case was dismissed because he failed to rebut the defendant’s affidavit and demonstrate any connection between leaks in 1983 and contamination discovered years later. However, in a California case arising under the Resource Conservation and Recovery Act where it was not clear which past or present owner controlled the tanks at the time they leaked, the burden of proof shifted to the defendants to show they were not responsible. *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991).

In *Noco Energy Corp. v. Chevron USA, Inc.*, CV 01-CV-897 (W.D.N.Y. 2002, Skretny, J.), the court denied summary judgment against the former owners of a contaminated gas station. In *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d 171 (2d Cir. 2003), the Second

Circuit affirmed summary judgment dismissing an Oil Spill Law suit, since the plaintiff failed to offer evidence of any discharges by the defendant, since the plaintiff “has not traced a drop of MVO petroleum to the soil or water.” The court concluded:

It certainly seems probable, as NMPC argues, that MVO's operations—the storage and transfer of tens of millions of gallons of fuel oil annually at Niagara Flats and the Texaco property for 16 years—cannot have been done without some seepage or leakage onto the soil, and from there to the waters of the state. But it is NMPC's burden to show a discharge resulting in a release.

F. Penalties. Navigation Law §192 provides for fines of up to \$25,000 per day for violation of the law, such as an illegal discharge of petroleum, and “[i]f the violation is of a continuing nature each day during which it continues shall constitute an additional, separate and distinct offense.” *See, e.g., State v. Markowitz*, 273 A.D.2d 636, 710 N.Y.S.2d 407, 412 (3d Dep’t 2000), *lv. den’d* 95 N.Y.2d 770, 722 N.Y.S.2d 473 (2000) (lower court assessed \$2.25 million penalties). For example, in *State v. LVF Realty Co., Inc.*, 16 Misc.3d 1112(A), 847 N.Y.S.2d 899 (Sup. Ct. Nassau Co. 2007), *aff’d* 59 A.D.3d 519, 873 N.Y.S.2d 664 (2d Dep’t 2009), over the objection that the punishment was a grossly excessive punishment in violation of the Due Process clause and the Eighth Amendment of the U.S. Constitution, the court upheld a fine of over \$6 million for failure to “investigate, contain and/or cleanup” discharges. *See also Oil Co., Inc. v. NYSDEC*, 277 A.D.2d 241, 716 N.Y.S.2d 398 (2d Dep’t 2000), 277 A.D.2d 241, 716 N.Y.S.2d 398 (2d Dep’t 2000), *lv. den’d* 96 N.Y.2d 708, 725 N.Y.S.2d 638 (2001).

II. Cleanups.

Under the Oil Spill Law, the New York State Department of Environmental Conservation (“DEC”) is authorized to clean up an oil spill site and hire contractors to assist it. Navigation Law §176. DEC’s right under Navigation Law §§176(2)(a) and 178 to enter, inspect and remediate contaminated property without first obtaining a warrant or other court order has been held not to conflict with constitutional rights against unreasonable searches and seizures *Murtaugh v. DEC*, 42 A.D.3d 986, 841 N.Y.S.2d 189, (4th Dep’t 2007).

Cleanups are funded by the New York Environmental Protection and Spill Compensation Fund (the “Oil Spill Fund”). Navigation Law §186. Dischargers are required to immediately contain a spill, Navigation Law §176(1), can be directed by DEC to undertake a cleanup, Navigation Law §176(2), or may voluntarily remediate with the approval of DEC and (if applicable) federal authorities. Navigation Law §176(7)(a). Voluntarily undertaking a cleanup is not an admission of liability. Navigation Law §176(7)(b).

“Cleanup and removal” is defined by Navigation Law §172(4) as:

(a) containment or attempted containment of a discharge, (b) removal or attempted removal of a discharge or, (c) taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources.

Cleanups should be consistent with the federal National Contingency Plan. Navigation Law §176(4). However, the failure to conform to the NCP has been held irrelevant to the ability to bring

a cost recovery suit. *Dolomite Products Co., Inc. v. Amerada Hess Corp.*, 2004 WL 1125154 (W.D.N.Y. 2004). DEC requires that:

Containment must be initiated immediately after discovery of a discharge to reduce the costs of recovery, increase the recyclability of recovered petroleum, and minimize hazards to public health, economic loss and environmental damage.

6 N.Y.C.R.R. §611.3(a). The objectives of cleanup are to (1) rapidly remove the discharge to increase recyclability and minimize environmental damage, (2) continue to protect environmental and natural resources, (3) soundly dispose of unrecyclable waste, (4) restore the environment to “pre-spill conditions,” (5) collect injured fauna for rehabilitation, and (6) collect evidence of natural Resource damages. Generally, containment and cleanup procedures follow the *New York State Water Quality Accident Contingency Plan and Handbook*. 6 N.Y.C.R.R. §§611.3(b), 611.6(b).

Ground and surface water standards for various substances, including oil and constituents of petroleum are set forth at 6 N.Y.C.R.R. Part 703. For oil, the standards require no “visible oil film nor globules of grease.” 6 N.Y.C.R.R. §703.2. While DEC formerly used DEC STARS Memo. #1, *Petroleum Contaminated Soil Guidance* (1992) as the guideline for cleanups levels, by a December 12, 2000 Memorandum from Michael J. O’Toole, Jr., Director of the Division of Environmental Remediation (available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/soilmemo.pdf), it announced that the soil cleanup objectives contained in Technical and Administrative Guidance Memorandum (TAGM) 4046, previously used for hazardous waste cleanups, would also apply to determination of soil cleanup levels at petroleum sites. According to the DEC web site:

The cleanup goal of the Department is the restoration of the environment to its pre-spill conditions. When the Department determines that cleanup of a site to pre-spill conditions is not possible or feasible, the recommended guidance can be found in Technical and Administrative Guidance Memorandum (TAGM) #4046.

<http://www.dec.ny.gov/chemical/8692.html>, Question 25. However, STARS #1 still “provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil,” so that “[e]xcavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site.” <http://www.dec.ny.gov/chemical/8692.html>, Questions 26 and 27.

DEC once considered formally adopting a policy on risk-based corrective action (“RBCA”). Such a RBCA policy would require baseline remedial action, including source removal and necessary plume management activities, but may permit residual contamination to remain and “naturally attenuate” provided all exposure pathways (vapor, groundwater, etc.) are eliminated through engineering (e.g. pavement) or institutional (e.g. deed restriction prohibiting excavation) controls. Nonetheless, RBCA principles are commonly applied to cleanups, and it is possible to negotiate cleanup levels on a case-by-case basis.

In 2002, DEC proposed *Draft DER-10 Technical Guidance for Site Investigation and Remediation* to try to clearly set forth the procedure for cleanup of hazardous waste and petroleum sites. On November 4, 2009, it released a revised draft, which is available on the DEC Web Site at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf. The draft is expected to be finalized some time in 2010. The guidance applies to all sites in the Brownfield Cleanup Program (“BCP”) and State Superfund Program, while sites being addressed under the Oil Spill Law “may be subject to this guidance on a site specific basis when the nature and extent of contamination and/or complexity of the issues warrant the use of this guidance.” *Draft DER-10* at 6. In November 2009, DEC also proposed guidance on Green Remediation (DER-31), available at

http://www.dec.ny.gov/docs/remediation_hudson_pdf/der31.pdf and a Commissioner's Policy on Soil Cleanup Objectives, at http://www.dec.ny.gov/docs/remediation_hudson_pdf/cpsoil.pdf.

Residents faced with a health risk can be relocated through an emergency oil spill relocation network headed by the Commissioner of Health. Navigation Law §177-a. If a discharger fails to relocate residents as recommended, pursuant to Navigation Law §176(7)(c), it can be liable for double the cost incurred by the Oil Spill Fund in such relocation. Navigation Law §181(1). Residents faced with a health risk can be relocated through an emergency oil spill relocation network headed by the Commissioner of Health. Navigation Law §177-a. If a discharger fails to relocate residents as recommended, pursuant to Navigation Law §176(7)(c), it can be liable for double the cost incurred by the Oil Spill Fund in such relocation. Navigation Law §181(1).

While DEC can proceed through formal administrative proceedings to require cleanups and collect fines for failure to report or clean a site, generally it proceeds through negotiated settlements that are memorialized in consent orders. Under a program commenced in 1994, DEC has adopted a short and uniform "Stipulation Agreement" or "STIP," by which an alleged discharger would agree to clean up a spill, but would not admit to liability. A STIP "is a short-form consent order between the Department and a potential responsible party (PRP) who accepts responsibility for clean-up of a petroleum spill." <http://www.dec.ny.gov/chemical/8692.html>, Question 28. Either "the responsible party or a volunteer (person(s) not responsible for the discharge)" can enter into a STIP. <http://www.dec.ny.gov/chemical/8692.html>, Question 29. Besides the simplicity of this procedure, another advantage is that it relieves the responding party from the necessity of obtaining permits for remedial work (such as an air permit to emit vapors).

In 2003, the New York State Legislature replaced the former Voluntary Cleanup Program (VCP) with the Brownfield Cleanup Program (BCP), which is primarily set forth in Title 14 of New York Environmental Conservation Law Article 27. The law, which is administered by the DEC, provides a process for voluntary cleanup of sites contaminated with hazardous waste or petroleum, rewarding the applicant with a liability release and tax incentives. A draft guide to the BCP has been developed by the New York State Department of Environmental Conservation and is available on their web site at: http://www.dec.ny.gov/docs/remediation_hudson_pdf/DraftBCPguide.pdf. The statute defines "brownfield site" as "real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant," ECL §27-1405(2), and in turn defines "contaminant" to include "hazardous waste and/or petroleum." ECL §27-1405(7-a).

The "brownfield site" definition is broad, as recently confirmed by the Court of Appeals in *Lighthouse Pointe Property Associates, LLC v. DEC*, 14 N.Y.3d 161, N.Y.S.2d (2010), covering sites where redevelopment which "may be complicated" by even the "potential presence of a contaminant." ECL §27-1405(2). Sites subject to an order for cleanup under Navigation Law Article 12 (the "Oil Spill Law") or ECL Article 17, Title 10 ("Control of the Bulk Storage of Petroleum") are not brownfield sites. ECL §27-1405(2)(d); 6 N.Y.C.R.R. §375-3.3(b)(4). However, this exception does not cover sites only subject to a stipulation agreement. ECL §27-1405(2)(d); 6 N.Y.C.R.R. §375-3.3(b)(4). See *Destiny USA Development, LLC v. New York State Dep't of Environmental Conservation*, 63 A.D.3d 1568, 879 N.Y.S.2d 865 (4th Dep't 2009), *lv. den'd* 66 A.D.3d 1502, 886 N.Y.S.2d 63 (4th Dep't 2009), *lv. den'd* N.Y.3d ___, ___ N.Y.S.2d (2010). A person is not eligible if they are subject to an outstanding claim by the New York Environmental Protection and Spill Compensation Fund for cleanup and removal costs for the site under the Oil Spill Law. ECL §27-1407(8)(d); 6 N.Y.C.R.R. §375-3.3(c)(3).

III. Oil Spill Fund

A. Payment for DEC Cleanups. Cleanups by DEC are funded by the New York Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund"), Navigation Law

§179, which is administered by the State Comptroller. Navigation Law §180. Disbursements from the Oil Spill Fund are allowed for specified cleanup costs and damages. Navigation Law §186; 2 N.Y.C.R.R. Part 404. The state can sue “the person responsible for causing a discharge for reimbursement of its costs.” Navigation Law §187.

A discharger sued to recover costs incurred by the State has no right to contest the reasonableness of the costs incurred in an action to determine liability, instead, an Article 78 proceeding must be commenced to challenge such costs. *State of New York v. Speonk Fuel Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375, 378 (2004). In *State v. Dennin*, 17 A.D.3d 744, 792 N.Y.S.2d 682 (3d Dep’t 2005), the Third Department, in a question of first impression, held that the possibility of an Article 78 review of the costs incurred by the State provided adequate due process. Conversely, the issue of liability may not be properly addressed in an Article 78 proceeding which challenges costs incurred, but must rather be brought in a plenary action to recover cleanup costs under Navigation Law § 181. *George Moore Truck & Equipment Corporation v. DEC*, 12 Misc.3d 1178(A), 824 N.Y.S.2d 762 (Sup. Ct. Cortland Co. 2006) (*see also* for a discussion of when the statute of limitations for an Article 78 might be triggered).

B. Private Claims. Injured third parties are allowed to file claims with the Oil Spill Fund for their damages, Navigation Law §182, 2 N.Y.C.R.R. Part 402, and if paid, the Comptroller acquires the claimant’s claims against the discharger by subrogation. Navigation Law §188. Claims generally must be filed “not later than three years after the date of discovery of damage” and “not later than ten years after the date of the incident which caused the damage.” Navigation Law §182; *Z & H Realty, Inc. v. Office of State Comptroller*, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dep’t 1999). While the statute states that the Oil Spill Fund “shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained,” Navigation Law §181(2), the term “claim” is defined to only include “claims of the fund or any claim by an injured person, who is not responsible for the discharge.” Navigation Law §172(3). Thus, the courts have held that a discharger liable under the Oil Spill Law is not entitled to payment of such a claim. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep’t 1983), *mot. den’d* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep’t 1991), *app. den’d* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992). The State Comptroller can arrange for settlements between the discharger, the injured party, and/or the Oil Spill Fund. Navigation Law §§183, 184, or hold hearings on disputed claims. Navigation Law §185. *See also* 2 N.Y.C.R.R. Part 403.

IV. Liens

If, within 90 days after a demand, a landowner fails to reimburse the state “for the costs incurred by the fund for the cleanup and removal of a discharge and for the payment of claims for direct and indirect damages as a result of a discharge,” the state may file a lien on land “upon which the discharge occurred.” Navigation Law §181-a. The environmental lien is “subject to the rights of any other person, including an owner, purchaser, holder of a mortgage or security interest, or judgment lien creditor, whose interest is perfected before a lien notice has been filed.” Navigation Law §181-a(4). The notice of lien is indexed in the same manner as a lien under Lien Law §10. Navigation Law §181-c. An action to vacate an environmental lien is governed by Lien Law §59, and should not be brought as an Article 78 proceeding. *Art-Tex Petroleum, Inc. v. New York State Department of Audit and Control*, 93 N.Y.2d 830, 687 N.Y.S.2d 61 (1999).

V. “Dischargers”

The statute does not define “person who discharged petroleum” or “discharger,” and in fact the term “discharger” does not even appear in Navigation Law §181, which governs liability under the law. However, the courts have broadly construed liability under the Oil Spill Law applies to

encompass “any party discharging oil.” *State v. Stewart's Ice Cream Co., Inc.*, 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). While it may be helpful to consider case law under the Clean Water Act and CERCLA, see *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep’t 1983), *mot. den’d* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983), the term “discharger” is not equivalent to an “owner” or “operator” under federal environmental laws.

A. Operators. The operator of a facility while it leaked gas, oil, or other forms of petroleum into the ground will generally be strictly liable for cleanup costs under the Oil Spill Law. *State v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep’t 1990); *Roosa v. Campbell*, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dep’t 2002). This may include both the operator of a service station, and an oil company that owns the tanks. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep’t 1995), *mot. den’d* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995); *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep’t 1996). A truck driver may be liable for a discharge from his truck resulting from an accident he did not cause. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep’t 1983), *mot. den’d* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). A residential homeowner may be liable as a discharger. *State v. New York Central Mutual Fire Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep’t 1989); *State v. Arthur L. Moon, Inc.*, 228 A.D.2d 826, 643 N.Y.S.2d 760 (3d Dep’t 1996), *app. dis’d* 89 N.Y.2d 861, 653 N.Y.S.2d 282 (1997). See also Navigation Law §172(14) (defining “operator”).

In *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep’t 2002), the Fourth Department considered liability for a leak from a storage tank on a property leased to an oil company. The lease placed responsibility for maintenance on the landlord, with costs to be shared, except for damage caused by the tenant’s negligence, and there was evidence that the leak might have originated before the tenant took possession. The court held that there was “an issue of fact whether the petroleum leak was caused by the negligence of [the oil company] and thus whether they are liable under the Navigation Law.”

B. Non-Operators. Any person who “set in motion the events which resulted in the discharge” is liable, even if there is “no proof is required of a specific wrongful act or omission which directly caused the spill.” *Domermuth Petroleum Equipment & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54, 56 (3d Dep’t 1985); see also *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001). Thus, liable “dischargers” have included a company that delivered oil and repaired the tank, *Id.*, a general contractor responsible for “oversight and management of the construction project, including the design, specification and installation of the UST system,” *Huntington Hospital v. Andron Heating and Air Conditioning, Inc.*, 250 A.D.2d 814, 673 N.Y.S.2d 456 (2d Dep’t 1998), the seller and installer of an oil tank, *Tift v. Bigelow’s Oil Service, Inc.*, 70 A.D.3d 1248, 894 N.Y.S.2d 594 (3d 2010); *Mendler v. Federal Ins. Co.*, 159 Misc.2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct. N.Y. Co. 1993), and the owner of a facility served by a pipeline that leaked off-site. *Steuben Contracting, Inc. v. Griffith Oil Co., Inc.*, 283 A.D.2d 1008, 726 N.Y.S.2d 308 (4th Dep’t 2001).

Generally, gasoline suppliers will not be liable for merely supplying fuel, unless they contributed to the discharge. Thus, where “a discharge from an underground storage tank occurs as a result of the means of storage rather than the manner of delivery and the supplier has no involvement in the storage of the product, that supplier is not in a position to halt or prevent a spill or clean up the resulting contamination from the spill and will not be held liable as a discharger.” *State v. Joseph*, 29 A.D.3d 1233, 1235, 816 N.Y.S.2d 214, 217 (3d Dep’t 2006). An oil company will not be liable for discharges unless the discharge “occurred during delivery or... was in a position to ‘halt [the] discharge, to effect an immediate cleanup or to prevent the discharge in the first place.’” *State v. Avery-Hall Corp.* 279 A.D.2d 199, 719 N.Y.S.2d 735 (3d Dep’t 2001); *State v. Cronin*, 186 Misc.2d 809, 717 N.Y.S.2d 828 (Sup. Ct. Albany Co. 2000). Further, gasoline producers are not liable for distributing gasoline that set in motion events that resulted in release of MTBE water

supplies, although they may be liable for spills that occurred in the distribution process. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 379 F.Supp.2d 348 (S.D.N.Y. 2005). But where an oil company overfilled a tank, it was liable. *Fuchs & Bergh, Inc., v. Lance Enterprises, Inc.*, 22 A.D.3d 715, 802 N.Y.S.2d 749 (2d Dep't 2005). Likewise, the supplier to a leaking home heating oil tank or hose, *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *rev. in part on other grounds*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991); *Lowenthal v. Perkins*, 164 Misc.2d 922, 626 N.Y.S.2d 358 (Sup. Ct. Tompkins Co. 1995); *Premier National Bank v. Effron Fuel Oil Co.*, 182 Misc.2d 169, 698 N.Y.S.2d 434 (Sup. Ct. Dutchess Co. 1999); *Carter v. Suburban Heating Oil Partners, L.P.*, 44 A.D.3d 1221, 845 N.Y.S.2d 482 (3d Dep't 2007), 698 N.Y.S.2d 434 (Sup. Ct. Dutchess Co. 1999), or an oil broker, *State v. Montayne*, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dep't 1993), may be liable.

In *State of New York v. Speonk Fuel Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375, 378 (2004), the Court of Appeals reaffirmed that liability may be imposed not just for active conduct, but rather the "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill." Thus, Speonk was liable since it knew about the spill, but failed to clean it up.

The failure to install a tank liner may result in liability as a discharger. *Barclay's Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570, 654 N.Y.S.2d 673 (2d Dep't 1997). Likewise, the failure of an oil company to provide corrosion protection when a pipeline was installed may give rise to liability. *Steuben Contracting, Inc. v. Griffith Oil Co., Inc.*, 283 A.D.2d 1008, 726 N.Y.S.2d 308 (4th Dep't 2001). A fire company that caused a discharge while fighting a fire was held liable (although today it might qualify under defense for fire departments set forth in Navigation Law §181(6)). *Nicol v. D.W. Jenkins Fire Co., Inc.*, 192 A.D.2d 164, 600 N.Y.S.2d 519 (3d Dep't 1993).

An environmental consultant can face liability as a discharger. An environmental contractor who caused a release when removing a tank may also be a discharger. *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999). Likewise, an architect who designed and supervised installation of a waste oil system could also be a discharger. *Irmer v. Dewolff Partnership Architects*, Index No. 1344/96 (Sup. Ct. Monroe Co. 2001, Frazee, J.). Further, a release which occurs in the process of remediating a property can cause a property owner to be liable. *Falls Bridge Development, LLC v. DioGuardi Enterprises, Inc.*, 2008 N.Y. Slip Op. 52638(U), 2008 WL 5562119 (Sup. Ct. Onondaga Co. 2008).

However, a "non-operator" co-tenant in a lease for an oil well was held not to be a discharger. *Whitesell v. Richardson-Walchli Corp.*, 237 A.D.2d 953, 654 N.Y.S.2d 541 (4th Dep't 1997), *mot. dis'd* 92 N.Y.2d 876, 677 N.Y.S.2d 782 (1998). Further, a tenant who did not utilize an on-site tank, and which it cannot be shown conclusively leaked during the tenant's tenure, will not be held liable as a discharger. *State v. Robin Operating Corporation*, 16 A.D.3d 944, 793 N.Y.S.2d 208 (3d Dep't 2005).

C. Owners. Unlike CERCLA, the Oil Spill Law does not provide that a landowner is automatically liable. The courts have struggled with the question of whether a landowner who does not actively operate the source of the spill is strictly liable under the statute. In a series of decisions, the Third Department held owners automatically liable, no matter if they knew tanks were even present on their property. *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991), *app. den'd* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992) (owner "unwittingly" purchased land which contained petroleum underground storage tanks that had previously leaked); *State v. King Service Inc.*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1991) (purchaser of leaking tanks); *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996) (purchaser of service station with leaking tanks).

In contrast, the Fourth Department held that a landowner who did not own leaking tanks was not automatically liable for activities of his tenant, because “[t]he statutory scheme makes clear that liability as a ‘discharger’ is based upon conduct, not status,” and rejected broader rulings of the Third Department, stating that “to the extent that those cases can be read as establishing landowner liability *per se*, they find no support in the statute and cannot be reconciled with other cases.” *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep’t 1994); *see also Whitesell v. Richardson-Walchli Corp.*, 237 A.D.2d 953, 654 N.Y.S.2d 541 (4th Dep’t 1997), *mot. dis’d* 92 N.Y.2d 876, 677 N.Y.S.2d 782 (1998) (owner of an oil well lease who did not control operations was not a discharger).

By 2000, the Appellate Divisions seemed to come into agreement with *Drouin*, holding that “the owner of the system” that caused the discharges is liable, and where there is no “unity of ownership,” so that the tanks or other petroleum system were owned by a tenant, the landowner was not automatically liable. *State v. Green*, 272 A.D.2d 214, 707 N.Y.S.2d 704 (3d Dep’t 2000), *rev.* 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001); *State v. Markowitz*, 273 A.D.2d 636, 710 N.Y.S.2d 407 (3d Dep’t 2000), *lv. den’d* 95 N.Y.2d 770, 722 N.Y.S.2d 473 (2000); *Four Star Oil & Gas Company v. Kalish*, 272 A.D.2d 292; 707 N.Y.S.2d 189 (2d Dep’t. 2000); *310 South Broadway Corp. v. McCall*, 275 A.D.2d 549, 712 N.Y.S.2d 206 (2d Dep’t 2000), *lv. den’d* 96 N.Y.2d 701, 722 N.Y.S.2d 793 (2001). After repeatedly ducking the issue, *see, e.g., Art-Tex Petroleum, Inc. v. New York State Department of Audit and Control*, 93 N.Y.2d 830, 687 N.Y.S.2d 61 (1999), the Court of Appeals finally tackled the issue when it reviewed *Green*.

In *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001), the Court of Appeals reversed the Third Department, and held that the statutory “language is sufficiently broad to include landowners, like Lakeside, who have both control over activities occurring on their property and reason to believe that their tenants will be using petroleum products.” 96 N.Y.2d at 407, 729 N.Y.S.2d at 423. Thus, defendant Lakeside, the owner of a trailer park was held to be liable as a discharger, since it “had the ability to control potential sources of contamination on its property, including Green’s maintenance of a 275-gallon kerosene tank.” *Id.* Its “failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger.” *Id.* However, the Court held that not all landowners will be liable:

By predicating liability on a landowner’s control over the contaminated premises, we ensure that landowners are not in all instances liable for spills occurring on their property. A landowner, for example, who falls victim to a “midnight dumper,” or an errant oil truck that spills fuel, would not be liable as a “discharger” because, in those cases, the landowner could not control the events resulting in the discharge. Here, however, Lakeside, as owner of the property, was in a position to control the site and source of the discharge. As Green’s lessor, moreover, Lakeside could have reasonably expected Green to use fuel to heat her home; and it received the benefit of the lease as well as the cleanup. In these circumstances, Lakeside is liable for the discharge.

96 N.Y.2d at 407, 729 N.Y.S.2d at 423-4. The Court of Appeals continued this theme in *Speonk*, as noted earlier.

Since *Green* and *Speonk* the courts have looked to whether a property owner had sufficient “control” to be deemed liable as discharger. In *Roosa v. Campbell*, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dep’t 2002), the Fourth Department followed *Green*, and held a landowner leased property to a service station, it was liable. In *Golovach v. Belmont L.M., Inc.* 4 A.D.3d 730, 731 773 N.Y.S.2d 139, 141 (3d Dep’t 2004), *lv. dis’d* 2 N.Y.3d 793, 781 N.Y.S.2d 291 (2004), the Third

Department reaffirmed that “strict liability is imposed upon ‘the owner of a system from which a discharge occurred . . . , regardless of a lack of proof of any wrongful act or omission by such owner directly causing the discharge.’” Similarly, in *State v. Dennin*, 17 A.D.3d 744, 792 N.Y.S.2d 682 (3d Dep’t 2005), the Third Department held that where a property owner had direct knowledge that petroleum products were stored and sold at the property at the time of his purchase, and during his ownership, he would be liable. The following year, in *State v. B & P Auto Service Center, Inc.* 29 A.D.3d 1045, 814 N.Y.S.2d 367 (3d Dep’t 2006), the Third Department further explained that a property owner would not be permitted to “evade liability by contractually limiting his or her day-to-day control of the premises” by limiting its right to reenter in the lease provisions. But where a defendant only owned the property in question prior to the discharges, it was not liable. *Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 272 A.D.2d 521, 708 N.Y.S.2d 138 (2d Dep’t 2000).

At least two recently reported decisions have dealt with the issue of a property owner who does not know that any underground storage tanks exist on their property, with very different results. The Nassau County Supreme Court, in *Eskenazi v. Mackoul*, Slip Copy, 22 Misc.3d 1107(A), 2008 WL 5491147 (Sup. Ct. Nassau Co. 2008) held that the property owner’s complete ignorance of the existence of underground storage tanks was irrelevant to the analysis of whether sufficient control existed, and held the property owner liable. In *State v. C.J. Burth Services, Inc.*, 22 Misc.3d 1130(A), 881 N.Y.S.2d 367 (Sup. Ct. Albany Co. 2009), however, Albany County Supreme Court came to a different conclusion, determining that the owner’s lack of knowledge of the tanks, and lack of proof that a discharge had occurred since their acquisition, would relieve them of liability. *See also, Union Turnpike Associates, LLC v. Getty Realty Corp.*, 27 A.D.3d 725, 812 N.Y.S.2d 628 (2d Dep’t 2006), in which the Second Department reinstated a property owner’s indemnification claim because “[t]he documentary evidence submitted by the defendant, which included the parties’ lease, did not conclusively establish that the plaintiff was responsible for maintaining and repairing the UST system.” *Id.* at 631.

D. Corporate Veil. Broad interpretations of the definitions of “owner” and “operator” under federal environmental laws can result in liability, in limited situations, for responsible corporate officers, parent corporations, and even lenders who were actively involved in operation of a facility that resulted in pollution. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); Monachino, *Courts May Find Individuals Liable for Environmental Offenses Without Piercing Corporate Shield*, 72 *New York State Bar Journal*, May 2000 at 22. In *State v. Markowitz*, 273 A.D.2d 636, 710 N.Y.S.2d 407, 412 (3d Dep’t 2000), *lv. den’d* 95 N.Y.2d 770, 722 N.Y.S.2d 473 (2000), the Third Department adopted a similar rule, and under the facts of the case refused to find individual liability:

Consistent with the relevant Federal and State statutes and developing case law, we hold that in order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated.

See also Golovach v. Belmont L.M., Inc. 4 A.D.3d 730, 731 773 N.Y.S.2d 139, 141 (3d Dep’t 2004), *lv. dis’d* 2 N.Y.3d 793, 781 N.Y.S.2d 291 (2004) (issue of fact whether president was a discharger when his name was on the tank registration certificate, and he had “his day-to-day control of the service station and the age and condition of the tanks”); *Allen v. W.W. Griffith Oil Company, Inc.*, Index No. 25554 (Sup. Ct. Wyoming Co. 1992, Dadd, J.) (president and CEO of oil company could not be held liable as a discharger where the “allegations...do not show that [he] participated in the wrongful conduct”); *Malin v. Bill Wolf Petroleum Corp.*, Index No. 21438/96 (Sup. Ct. Nassau Co.

1999) (defendant who controlled corporate discharger liable); *State v. Amicucci*, Index No. 629/94 (Sup. Ct. Putnam Co. 1995) (corporate officer may be personally liable).

E. “Victim” Properties. While there is no definitive case law on the issue, it would seem that a nearby owner whose land is contaminated by a spill from another property could not be liable under the Oil Spill Law, since the neighbor would not be a “person who discharged petroleum,” especially in light of the Court of Appeals holding in *Green*. Furthermore, under analogous case law under CERCLA, a property owner cannot be held liable for “passive migration.” See *ABB Industrial v. Prime Technology*, 120 F.3d 351 (2d Cir.1997).

The extent to which an on-site petroleum discharge has migrated off-site will dictate the level of cleanup required. DEC generally requires a discharger to completely remediate off-site contamination, to the extent feasible, in order to avoid claims by victim property owners against the Oil Spill Fund.

F. Proof. Generally, where there are conflicting expert opinions and no direct proof of the discharge, but only circumstantial evidence, the courts will deny summary judgment and require a trial. *State v. Metro Resources, Inc.*, 14 A.D.3d 982, 788 N.Y.S.2d 697 (3d Dep’t 2005); *Pepe v. E & M Basement Waterproofing Co., Inc.*, 6 Misc.3d 1027(A), 800 N.Y.S.2d 354 (Sup. Ct. Nassau Co. 2005); *Stivers v. Johnstone*, Index No. 39901 (Sup. Ct. Seneca Co. 2009, Bender, J.); *Emerson Enterprises, LLC v. Kenneth Crosby New York, LLC*, 2009 WL 3190445 (W.D.N.Y. 2009). In contrast, where proof of a spill is unrebutted, summary judgment will be granted. See *FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008); *Fuchs & Bergh, Inc., v. Lance Enterprises, Inc.*, 22 A.D.3d 715, 802 N.Y.S.2d 749 (2d Dep’t 2005). Mere speculation on an alternate cause will not preclude summary judgment if plaintiff’s proof is not rebutted. *Patel v. Exxon Corp.*, 43 A.D.3d 1323, 841 N.Y.S.2d 908 (4th Dep’t 2007); *State v. Passalacqua*, 19 A.D.3d 786, 797 N.Y.S.2d 576 (3d Dep’t 2005). In *Sweet v. Texaco, Inc.*, 67 A.D.3d 1322, 890 N.Y.S.2d 233 (4th Dep’t 2009), summary judgment was granted against the defendant for contribution, but an issue of fact was presented whether the plaintiff was also liable and could proceed under section 181(5).

Many cases have allowed the testimony of forensic chemists to give opinions on the age or source of contamination, both in federal, *Dolomite Products Co., Inc. v. Amerada Hess Corp.*, 2004 WL 1125154 (W.D.N.Y. 2004); *FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008), and state courts, *Grant Ave. & Standart Ave Development, LLC v. Petr-All Petroleum Consulting Corp.* (Sup. Ct., Cayuga Co., October 3, 2008, Fandrich, A.J.S.C.). In *Carter v. Suburban Heating Oil Partners, L.P.*, 44 A.D.3d 1221, 845 N.Y.S.2d 482 (3d Dep’t 2007), a question of fact was presented as to who ordered an ill-advised kerosene delivery to system with leaky pipes.

VI. Private Right of Action

A. Right of Action By Injured Party Against Discharger. Previously, the Appellate Division, Fourth Department had held that private parties had no private cause of action against a discharger under the Oil Spill Law. *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep’t 1990), *mot. den’d* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). In reaction to *Snyder*, the Legislature amended Navigation Law §181 in 1991 to add subsection 5, which now explicitly provides:

Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who discharged the petroleum.

This provision has also been held to apply retroactively to spills that occurred before its enactment. *Snyder v. Newcomb*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993); *Wheeler v. National School Bus Service*, 193 A.D.2d 998, 598 N.Y.S.2d 109 (3d Dep't 1993). Thus, landowners whose property is contaminated, and innocent persons who are exposed, clearly have a right to sue a discharger under the Oil Spill Law. *Id.*; *Cf. Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687 (4th Dep't 1996) (damages may be allowable for continuing nuisance based upon mere proximity of uncontaminated property to landfill). This remedy does not preempt other available common law and equitable remedies. Navigation Law §193; *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dep't 2000).

B. Right of Discharger to Sue Another Discharger. There has been much confusion over whether a “discharger” has recourse under the Oil Spill Law against another discharger. *See* Koegel, *Dischargers v. Dischargers Under the Navigation Law*, 214 N.Y.L.J. 1 (July 25, 1995). In *Busy Bee Food Stores v. WCC Tank Lining Technology, Inc.*, 202 A.D.2d 898, 609 N.Y.S.2d 118 (3d Dep't 1994), *mot. den'd* 83 N.Y.2d 953, 615 N.Y.S.2d 877 (1994), the Third Department held that a discharger “has no remedy under the statute against another discharger.” *Contra Mendler v. Federal Ins. Co.*, 159 Misc.2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct. N.Y. Co. 1993).

In *White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995), the Court of Appeals resolved this issue, and decided that “faultless” owners can sue other dischargers under section 181(5):

Although even faultless owners of contaminated lands have been deemed “dischargers” for purposes of their own section 181(1) liability, where they have not caused or contributed to (and thus are not “responsible for”) the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage.

The Court of Appeals rejected the Third Department’s holding in *Busy Bee*, and further distinguished *New York v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1993), because the latter case properly rejected a discharger’s claim against the state’s Oil Spill Fund, rather than against another discharger under the relatively new private right of action under §181(5). Thus, in *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996), the present owner/operator of a service station could sue prior owners for liability as dischargers. In *White*, defendant Long could only be held liable if he was a “guilty” discharger, which would preclude his claim under §181(5), pursuant to Navigation Law §172(3); *see also Hjerpe v. Globerman*, 280 A.D.2d 646, 721 N.Y.S.2d 367 (2d Dep't 2001); *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dep't 2000); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010). Since in *FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008), the new owner removed the leaking tanks within eight months, they were “faultless.”

Accordingly, under *White*, apparently there are two classes of dischargers who can be held liable to the state for a cleanup under §181(1) - “guilty” dischargers and “innocent” (“faultless”) landowners. *See also White v. Long*, 229 A.D.2d 178, 655 N.Y.S.2d 176 (3d Dep't 1997). While an innocent landowner can sue “guilty” dischargers, it is unlikely that a claim could be made against a prior “innocent” owner.

In *State v. Green*, 96 N.Y.2d 403, 408, 729 N.Y.S.2d 420, 424 (2001), the Court of Appeals reaffirmed this interpretation, noting that where a landowner who had the ability to control a tenant’s activities was liable as a discharger, it was “not, however, without redress,” and might “seek contribution from the actual discharger” under Navigation Law §181(5). The Court inexplicably failed to cite the right to contribution under Navigation Law §176(8), discussed *infra*. Presumably,

“contribution” under section 176(8) is limited to liabilities to third parties or responsibility for cleanup costs, while the right to sue under section 181(5) goes a step further to allow first-party damages to be recovered by an “innocent” discharger.

C. Indemnification or Contribution. Navigation Law §176(8) provides that “every person providing cleanup, removal of discharge of petroleum or relocation of persons” pursuant to Navigation Law §176 (which authorizes cleanup activities by DEC and dischargers) “shall be entitled to contribution from any other responsible party.” Whether based directly upon this provision, or common law principles, a discharger who conducts a cleanup or other response activities may have a cause of action for some or all of his response costs under the Oil Spill Law under an indemnification or contribution theory. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *Sweet v. Texaco, Inc.*, 67 A.D.3d 1322, 890 N.Y.S.2d 233 (4th Dep’t 2009); *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000); *145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep’t 1993); *State v. King Service Inc.*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep’t 1991); *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997); *Barclays Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570, 654 N.Y.S.2d 673 (2d Dep’t 1997); *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, 249 A.D.2d 793, 671 N.Y.S.2d 850 (3d Dep’t 1998). However, no contribution claim is available for a party that has not incurred response costs or other damages. *FCA Associates v. Texaco, Inc.*, 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. 2005).

When considering the question of contribution, the court must make a determination of “comparative fault.” *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep’t 2002). A contractual allocation between the parties may be determinative. *101 Fleet Place Associates v. New York Telephone Co.*, 197 A.D.2d 27, 609 N.Y.S.2d 896 (1st Dep’t 1994); *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep’t 2002).

VII. Insurer of a Discharger

A. Direct Right of Action. Under Navigation Law §190, not only the state, *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep’t 1989), but also an injured party may bring suit directly against a discharger’s insurer under the Oil Spill Law. *Snyder v. Newcomb Oil Co., Inc.*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep’t 1993). Late notice is not necessarily a defense to this claim. *State v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep’t 1995). Generally, it is acceptable to give notice to an insurer within a reasonable time of discovering that the existence of a policy and the identity of the insurer after using reasonable diligence to discover them. *State of New York v. American National Fire Insurance Company*, 193 A.D.2d 996, 598 N.Y.S.2d 339 (3d Dep’t 1993); *State of New York v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep’t 1995). *See also, Grant Ave. & Standart Ave Development, LLC v. Petr-All Petroleum Consulting Corp.* (Sup. Ct., Cayuga Co., October 3, 2008, Fandrich, A.J.S.C.). *But see, Henner v. Gemini* (Sup. Ct., Monroe Co., December 23, 2008, Stander, J.S.C.) (appeal to Fourth Department pending).

However, dischargers may not be able to sue another discharger’s insurance company to obtain compensation for an injured party. *New York v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep’t 1993).

B. Pollution Exclusion. A claim under Navigation Law §190 may be subject to the pollution exclusion and other terms of the insurer’s policy. *State v. Capital Mut. Ins. Co.*, 213 A.D.2d 888, 623 N.Y.S.2d 660, *mot. den’d* 86 N.Y.2d 702, 631 N.Y.S.2d 606 (1995). The Court of Appeals has decided that there is a “temporal element” to the “sudden and accidental” exception to the pollution exclusion contained in policies issued before about 1986 that did not cover a pinhole

leak in an underground oil tank where there was no showing of “an abrupt, environmentally significant discharge of pollutants could be inferred,” and “the allegations regarding the temporal aspects of the petroleum leakages actually describe them as having occurred continuously over a period of many years.” *Northville Industries Corp. v. National Fire Insurance Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 635, 657 N.Y.S.2d 564, 569 (1997); *see also Ziankoski v. Boonville Oil Co., Inc.*, 241 A.D.2d 951, 661 N.Y.S.2d 322 (4th Dep’t 1997). A broad pollution exclusion can be fatal to a Navigation Law §190 claim. *Bruckner Realty, LLC, v. County Oil Company, Inc.*, 40 A.D.3d 898, 838 N.Y.S.2d 87 (2d Dep’t 2007).

However, in other situations, the “pollution exclusion” does not bar claims arising out of contamination. *See, e.g., Whitesell v. Richardson-Walchli Corp., Inc.*, Index No. 23168 (Sup. Ct. Allegany 1997, Himelein, J.), *aff’d* 237 A.D.2d 953, 654 N.Y.S.2d 541 (4th Dep’t 1997), *mot. dis’d* 92 N.Y.2d 876, 677 N.Y.S.2d 782 (1998); *Petr-All Petroleum Corp. v. Fireman’s Ins. Co. of Newark, N.J.*, 188 A.D.2d 139, 593 N.Y.S.2d 693 (4th Dep’t 1993); *Family Service of Rochester, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 149 Misc.2d 48, 562 N.Y.S.2d 358 (Sup. Ct. Monroe Co. 1990). Note that some parties liable as a discharger, such as a fuel delivery service, may not be included within some versions of the “absolute pollution exclusion.” Costs incurred under the Oil Spill Law have been held to be “property damages” covered under a general liability policy. *Don Clark, Inc. v. U.S. Fidelity and Guaranty Co.*, 145 Misc.2d 218, 545 N.Y.S.2d 968 (Sup. Ct. Onondaga Co. 1989).

In *Griffith Oil Co., Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 68 A.D.3d 1622, 890 N.Y.S.2d 883 (4th Dep’t 2009), *lv. granted* A.D.3d , N.Y.S.2d (4th Dep’t 2010), products completed-operations coverage provided coverage for a leak from a pipeline owned by a third party.

C. Several Liability. In *Consolidated Edison Co. of New York v. Allstate Insurance Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002), the Court of Appeals considered the question of how to allocate the costs of remediating environmental contamination that occurred over many years, and could not be identified with particular policies. The court approved *pro rata* allocation between policies on a “time on the risk” basis, rather than imposing joint and several liability on each insurer.

VIII. Defenses

A. Statutory Defenses. The Oil Spill Law provides limited defenses. Defenses for an “owner or operator of a major facility or vessel responsible for a discharge” are limited to an “act or omission solely caused by war, sabotage, or government negligence.” Navigation Law §181(4). However, it is not clear if facilities that are not large enough to be a “major facility” have any broader defenses. Further, if a discharge is permitted, it is not covered by the Oil Spill Law. Navigation Law §173. Limited defenses are provided for “responders,” Navigation Law §178-a; *see Hilltop Nyack Corp. v. TRMI Holdings*, 275 A.D.2d 440, 712 N.Y.S.2d 888 (2d Dep’t 2000), good Samaritans, §176(7)(b), and volunteer firemen, Navigation Law §181(6), provided there is no “willful or gross negligence,” which may be an issue of fact, *AMW Materials Testing, Inc. v. Town of Babylon*, 187 Fed.Appx. 24 (2d Cir. 2006), as well as non-negligent cleanup contractors. Navigation Law §176(7)(a). The common law doctrine of “assumption of risk” does not apply to bar a claim of the knowing purchaser of a contaminated property. *FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008).

A new defense for acts of third parties was added to the law in 2003, and clarified in 2004. Navigation Law §181(4)(a). It largely tracks the CERCLA third party defense, and applies if a defendant proves it “exercised due care with respect to the petroleum concerned,” and “took

precautions against the acts or omissions of any such third party and the consequences of those acts or omissions.” Navigation Law §181(4).

B. Statute of Limitations.

1. Property Damage. In general, under CPLR §214, actions for property damage (or personal injury) must be brought within three years of the date of accrual of the claim. *New York v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep’t 1993); *FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008). However, under CPLR §214-c, which was enacted in 1986, the three-year time limit (as well as the limitations periods for claims against the state and municipalities), for claims for personal or property injuries arising out of “latent effects of exposure to any substance” runs “from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” In addition, CPLR §214-c(4) provides that a plaintiff would have one year after the time of discovery of the cause of the injury to bring suit if he or she could show that “technical, scientific or medical knowledge and information sufficient to ascertain the cause of his or her injury had not been discovered, identified or determined” prior to the expiration of the three-year period after discovery of the injures, but was discovered within five years of discovery of the injury. The issue of when a plaintiff “should have known” is generally a question of fact, and the statute is construed liberally in a plaintiff’s favor. *Cochrane v. Owens Corning*, 219 A.D.2d 557, 631 N.Y.S.2d 358, 367 (1st Dep’t 1995).

Under the “two-injury rule,” knowledge of one type of contamination does not imply knowledge of all forms of contamination on real property. *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep’t 1997), *lv to app. den’d* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997). For instance, in *Bimbo v. Chromalloy American Corp.*, 226 A.D.2d 812, 640 N.Y.S.2d 623 (3d Dep’t 1996), the Third Department held that an issue of fact was presented as to whether TCE contamination in a well put a landowner on notice to soil and shallow groundwater contamination. In *Lessord v. General Electric Co.*, 2002 U.S. Dist. LEXIS 24839 (W.D.N.Y. Aug. 29, 2002), the court found a question of fact as to whether earlier “incidents and manifestations of contamination were separate and distinct from the contamination giving rise to [the] lawsuit” for hazardous waste and petroleum contamination. However, in *Kozemko v. Griffith Oil*, 256 A.D.2d 1199, 682 N.Y.S.2d 503 (4th Dep’t 1998), tank tests prior to closing should have put a buyer on notice.

2. Continuing Wrongs. Under the doctrine of “continuing torts,” the statute of limitations for a continuing trespass (*e.g.* seeping gasoline) recommences each day the tort continues. Nonetheless, in *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993), the Court of Appeals held that CPLR §214-c extinguished the doctrine of “continuing trespass” for purposes of claims for damages, although a claim for an injunction may continuously reaccrete (with the limitations period continuously restarting) if contamination continues to seep.

3. Indemnification or Contribution. Claims for response costs in the nature of indemnification or contribution (as opposed to property damages to the claimant) are subject to the six-year statute of limitations under CPLR §213, *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep’t 2002); *State of New York v. Ackley*, 289 A.D.2d 812, 734 N.Y.S.2d 722 (3d Dep’t 2001), *app. dis’d* 100 N.Y.2d 555, 763 N.Y.S.2d 809 (2003); *750 Barclays Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570, 654 N.Y.S.2d 673 (2d Dep’t 1997); *Country Road Realty Corp. v. Exxon Corp.*, 229 A.D.2d 1034, 645 N.Y.S.2d 186 (4th Dep’t 1996); *145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep’t 1993); *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997); *Noco Energy Corp. v. Chevron USA, Inc.*, CV 01-CV-897 (W.D.N.Y. 2002, Skretny, J.); *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000), as is a claim by the state. *Town of Guilderland v. Texaco Refining and Marketing, Inc.*, 159 A.D.2d 829, 552 N.Y.S.2d 704

(3d Dep't 1990). Even if claims for property damages are barred, a claim for response costs may be timely under the six-year statute. *See FCA Associates v. Texaco, Inc.*, 2008 U.S. Dist. LEXIS 8116 (W.D.N.Y. 2008).

In *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997), the Third Circuit held that the statute has not yet even begun to run for claims for future remediation costs. In *State of New York v. Speonk Fuel, Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375 (2004), the Court of Appeals held that a new claim accrues, and the statute begins to run, each time a payment is made, on a payment-by-payment basis.

C. Real Estate Contract. Where a landowner is suing the prior owner, the doctrine of merger is generally a bar to claims arising out of the purchase and sale contract, but not a defense to claims under an environmental statute like the Oil Spill Law. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *rev. on other grounds*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995). Likewise, an "as is" clause is probably only a bar to warranty claims, and is not a defense to a statutory claim for environmental contamination, "leaving the burden of environmental hazards with the seller." 51 *U. Pitts. L. Rev.* 995, 1019, *An 'As Is' Provision in a Commercial Property Contract: Should It Be Left As Is When Assessing Liability For Environmental Torts?* (1990); *International Paper Co. v. GAF Corp.*, 1995 WL 760641 (N.D.N.Y. 1995).

Thus, the "as is" clause does not bar a claim under the Oil Spill Law. *Umbra U.S.A., Inc. v. Niagara Frontier Transportation Authority*, 262 A.D.2d 980, 981, 693 N.Y.S.2d 371, 372 (4th Dep't 1999); *Rugaber v. Vella*, Index No. 88869 (Sup. Ct. Ontario Co. 2001, Henry, J.). However, a former owner is generally not liable for pollution that happened after the sale. *Kozemko v. Griffith Oil*, 256 A.D.2d 1199, 682 N.Y.S.2d 503 (4th Dep't 1998).

D. Sovereign Immunity. In *Aces & Eights Realty, LLC v. Hartman*, 2002 U.S. Dist. LEXIS 22647 (W.D.N.Y. 2002), the Court refused to dismiss a suit under the Oil Spill Law against the Small Business Administration, which was a former owner, finding it was not barred by sovereign immunity.

IX. Remedies.

Generally, a discharger is liable for "all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." Navigation Law §181(1); *see also* Navigation Law §181(5). "Indirect damages" include "all costs associated with the cleanup and removal of a discharge." *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003). Damages may also include natural resource damages, "[l]oss of income or impairment of earning capacity due to damage to real or personal property," loss of tax revenues to local governments, and interest on loans obtained for the purpose of "ameliorating the adverse effects" of a discharge. Navigation Law §181(2).

A. Cleanup Costs. A discharger is liable for "all cleanup and removal costs." Navigation Law §181(1); *see also* Navigation Law §181(5); *Gettner v. Getty Oil Co.* 266 A.D.2d 342, 701 N.Y.S.2d 64 (2d Dep't 1999), *lv. den'd* 95 N.Y.2d 860, 714 N.Y.S.2d 704 (2000); *State v. City of Yonkers*, 293 A.D.2d 739, 741 N.Y.S.2d 430 (2d Dep't 2002). "Cleanup and removal costs" are defined as "all costs associated with the cleanup and removal of a discharge including relocation costs pursuant to section one hundred seventy-seven-a of this article incurred by the state or its political subdivisions or their agents or any person with approval of the department." Navigation Law §172(5). In *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000), the court held that informal approval by DEC (a meeting followed by a confirming letter) may be sufficient. It is not necessary that a discharge actually caused contamination in order to recover costs incurred investigating a discharge.

In *State v. Neill*, 17 A.D.3d 802, 795 N.Y.S.2d 355 (3d Dep't 2005), the Third Department rejected an argument that, since costs incurred to investigate the subsurface confirmed that no contamination existed, and thus, no "cleanup" or "removal" costs were incurred. The Court held that "[m]ost assuredly, the investigative and monitoring costs incurred in attempting to locate and remove a substantial quantity of missing fuel oil discharged on defendant's property comes within the broad definition of 'cleanup and removal' contained in the statute." *Id.* at 803-4, 795 N.Y.S.2d at 357.

B. Property Damages.

1. Permanent Property Damages. Navigation Law §181(2)(a) indicates that property damages recoverable include "reduction in value of such property caused by such discharge by comparison with its value prior thereto." Thus, plaintiffs can recover "damages for diminution in the fair market value of their real property allegedly caused by contamination from hazardous substances." *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep't 1994). "[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration." *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39, 447 N.Y.S.2d 696, 698 (1982); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998). In *Rizzuto v. Getty Petroleum Corp.*, 289 A.D.2d 217, 736 N.Y.S.2d 233 (2d Dep't 2001), a jury verdict of \$509,000 in diminution of property value was upheld. In another case, the Second Department determined that it was necessary for an appraiser to compare properties with oil spills to properties without, or the expert's opinion as to stigma damage would be nothing more than speculation. *Fusco v. State Farm Fire and Casualty Co.*, 57 A.D.3d 939, 871 N.Y.S.2d 295 (2d Dep't 2008). Where, in spite of efforts to clean up property after an oil spill, the property cannot be restored to their pre-spill condition, "the proper measure of damages is the total amount of the diminution in value plus the costs of repairs." *Turnbull v. MTA New York City Transit*, 28 A.D.3d 647, 814 N.Y.S.2d 191 (2d Dep't 2006).

2. Stigma Loss. While cleanup costs may compensate a plaintiff for loss in property value, cases involving environmental contamination have recognized that permanent property damages may also include loss due to stigma that remains even after a property is cleaned up. *Turnbull v. MTA New York City Transit*, 28 A.D.3d 647, 814 N.Y.S.2d 191 (2d Dep't 2006); *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179 (W.D.N.Y. 1999), *vacated* 216 F.3d 291 (2d Cir. 2000) (recognizing "uncertainty in New York law as to the availability of stigma damages"); *see also Commerce Holding Corp. v. Board of Assessors of the Town of Babylon*, 88 N.Y.2d 724, 649 N.Y.S.2d 932 (1996).

While in *Putnam v. State of New York*, 223 A.D.2d 872, 636 N.Y.S.2d 473 (3d Dep't 1996), the court contemplated awarding stigma damages under the Oil Spill Law, it rejected an appraiser's opinion that an oil spill stigmatized the property to render it unmarketable, since the appraiser "did not take into account that claimant might be able to use or rent the commercial portion of such property." *See also AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003)(evidence did not support award of stigma damages).

3. Temporary Property Damages. In *Putnam v. State of New York*, 223 A.D.2d 872, 636 N.Y.S.2d 473 (3d Dep't 1996), the court allowed recovery for temporary injury due to "decrease in the rental value during pendency of the injury" until cleanup was complete, treating the spill as a temporary easement. Likewise, in *Gettner v. Getty Oil Co.* 266 A.D.2d 342, 701 N.Y.S.2d 64 (2d Dep't 1999), *lv. den'd* 95 N.Y.2d 860, 714 N.Y.S.2d 704 (2000), the plaintiff was allowed to recover lost rent, but only for the period in which the cleanup should have been completed.

C. Personal Injuries. Some courts have held that personal injuries are not available under the Oil Spill Law, and that an injured party's damages are limited to "economic loss." *Wever Petroleum Inc. v. Gord's Ltd.*, 225 A.D.2d 27, 649 N.Y.S.2d 726 (3d Dep't 1996); *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996); cf. *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. 1989) *rev. in part on other grounds*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (allowing claim that sought personal injuries). However, the statute does not contain any clear exclusion of personal injuries from "all direct and indirect damages." Further, there is no prohibition in bringing other common law causes of action for which personal injury damages are available in conjunction with a Navigation Law claim. *See General Casualty Insurance Company v. Kerr Heating Products*, 48 A.D.3d 512, 852 N.Y.S.2d 257 (2d Dep't 2008).

D. Attorneys' Fees. Counsel fees are recoverable as an "indirect damage" under the Oil Spill Law. *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996); *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003); cf. *Gettner v. Getty Oil Co.* 266 A.D.2d 342, 701 N.Y.S.2d 64 (2d Dep't 1999), *lv. den'd* 95 N.Y.2d 860, 714 N.Y.S.2d 704 (2000) (lease did not allow the recovery of attorney's fees for litigation). In *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003), the Second Department awarded attorney's and expert's fees (except those connected with a collateral tax certiorari proceeding) except for "their appraiser, recovery for which is not warranted under the circumstances," since:

Under the facts of this case, the costs incurred during the litigation were the result of the defendant's extended delay in cleaning the contamination, and its recalcitrance in committing to a plan of action which would restore the plaintiffs' property to its pre-spill condition while maintaining a minimum disruption of the plaintiffs' business, thus necessitating the litigation and its attendant costs.

While the *AMCO* decision allows for all litigation costs to be recovered, it also suggests that the court has some degree of discretion in making the award, depending upon the culpability of the defendant. Litigants need not even incur cleanup or removal costs to be entitled to recover their attorney's fees. *Starnella v. Heat*, 14 A.D.3d 694, 789 N.Y.S.2d 227 (2d Dep't 2005). *See also, State v. Vantage Petroleum Corp.*, 20 Misc.3d 1140(A), 872 N.Y.S.2d 693 (Sup. Ct. Albany Co. 2008).

E. Other Types of Damages. Cases arising under other legal theories have allowed other types of damages arising out of environmental contamination. These categories of damages will probably be found by the courts to fall within the category of "all direct and indirect damages, no matter by whom sustained," recoverable under the Oil Spill Law. Navigation Law §181(1); *see also* Navigation Law §181(5).

1. Consequential Damages. Where petroleum is discharged on commercial property, plaintiff may recover lost profits that would have been earned from the business conducted on the property. *Putnam v. New York*, 223 A.D.2d 872 (3d Dep't 1996). However, where petroleum is discharged on residential property, plaintiff may not recover lost income if the income is not earned from activity conducted on the property. *Donovan v. Rocklyn Fuel Oil Corp.*, 23 Misc.3d 1130(A), 889 N.Y.S.2d 505 (Sup. Ct. Nassau Co. 2009). In *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003), petroleum contamination prevented a company from expanding to service increased business it has secured, and it was properly awarded lost profits. *See also Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Co.*, 173 A.D.2d 138, 578 N.Y.S.2d 770 (4th Dep't 1991) (in negligence case involving PCB contamination, plaintiffs were allowed to make claims for damages due to

interruption of their businesses, including lost profits, and additional business expenses such as “rental expense, lost subscriber revenue, lost installation revenue, employee overtime, lost sales commission, employee wages and additional advertising expense”).

2. Avoidable Consequences. Under the doctrine of avoidable consequence, a plaintiff may be able to recover for the costs of such things as bottled water, testing water and installing filters in order to avoid damages from a contaminated water supply. *See Leicht v. Town of Newburgh Water District*, 213 A.D.2d 604, 624 N.Y.S.2d 506 (2d Dep’t 1995) (negligence case involving drinking water contamination).

3. Loss of Quality of Life. Since compensation for “loss of quality of life” should be considered an element of property damage, it is probably recoverable under the Oil Spill Law, even if personal injuries are not. *See, e.g. Scribner v. Summers*, CIV No. 6094L (W.D.N.Y. 1996), *mod.* 138 F.3d 471 (2d Cir. 1998) (hazardous waste contamination).

F. Injunction. In environmental cases, a plaintiff may also be able to obtain the equitable remedy of injunction, if he or she can show “irreparable harm.” *Poughkeepsie Gas Co. v. Citizens’ Gas Company*, 89 N.Y. 493, 497-8 (1882). Since an injunction is an equitable remedy, the court must balance the equities of the situation, and take into consideration whether the plaintiff has an adequate remedy at law by obtaining damages. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970).